

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Bright House Networks, LLC)	
)	CSR 6484-E
Petition for Determination of Effective)	
Competition in Four Florida Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 2007

Released: March 1, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Bright House Networks, LLC ("Bright House") has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in four Florida communities.¹ Bright House alleges that its cable system serving the communities are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act")² and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and DISH Network ("DISH"). The City of Deland filed an opposition, to which Bright House replied.³

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Based on the

¹See 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1) & (2). The franchise area consists of Deland (FL0116), Palm Coast (FL0374), Ormond Beach (FL0016, FL0417), and Orange City (FL0136).

²See 47 U.S.C. § 543(a)(1).

³Bright House's Reply was filed late according to counsel because it was not served with a copy of the opposition by the City of Deland. According to Bright House's counsel, it made numerous inquiries to the Commission file room staff, but was informed that no opposition had been filed. Bright House's counsel was subsequently informed by Commission file room staff that an opposition had been filed. The City of Deland filed a Response to Bright House's Reply requesting that we reject Bright House's late Reply. We will accept Bright House's late Reply because the e-mails provided by Bright House's counsel establish that it made reasonable attempts to learn of any oppositions that were filed. We therefore deny the City's request to reject Bright House's Reply.

⁴47 C.F.R. § 76.906.

⁵47 C.F.R. § 76.905.

⁶See 47 C.F.R. §§ 76.906 & 907.

record in this proceeding, Bright House has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁷ Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁸ Bright House has not provided evidence of the advertising of DBS service in the news media serving the Communities, however, it argues that potential subscribers are aware of DBS because of prior Commission findings regarding the ubiquitous availability of DBS service, DBS providers' extensive national, regional and local advertising and marketing efforts through television, radio, internet, print media, and direct marketing.⁹ The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.¹⁰ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the communities listed on Attachment A are DBS subscribers, we conclude that the population of the communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.¹¹ We find further that Bright House has demonstrated that the communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

4. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Bright House sought to determine the competing provider penetration of its franchise area by purchasing a report from Media Business Corp ("MBC," previously known as SkyTrends), that identified the number of subscribers attributable to the DBS providers within the Community on a five-digit zip code basis.¹² Bright House derived the DBS subscribership based on an allocation methodology previously approved by the Commission.¹³

5. Deland filed an opposition alleging that Bright House has not met its burden of demonstrating that the number of households subscribing to DBS providers exceeds 15 percent of the households in the franchise area.¹⁴ More specifically, Deland initially questions whether DBS is

⁷47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

⁸See MediaOne of Georgia, 12 FCC Rcd 19406 (1997).

⁹See Petition at 4-5.

¹⁰*Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹¹See 47 C.F.R. § 76.905(g). See also Petition at 6-7 and Exhibit B.

¹²Petition at 7-8 and Exhibit E.

¹³*Id.*

¹⁴Opposition at 1-2.

technically and reasonably available to more than 50 percent of the households in the City because 29 percent of the City's households are multiple dwelling units ("MDUs") and Bright House has never provided copies of its bulk contracts with MDUs to the City.¹⁵ Moreover, the City claims that people living in condominiums and other planned unit developments may be prohibited from installing a DBS dish under the Commission's Over-the-Air Reception Services Rule ("OTARD").¹⁶ Bright House also questions whether potential households in the franchise area are reasonably aware of the DBS Providers' services since Bright House only cited website addresses, which are not advertisements available to consumers, and did not provide any advertisements that circulated in the City.¹⁷ Deland also argues that Bright House has not satisfied its burden of proving that DBS subscribership exceeds 15 percent of households in the City because Bright House continues to rely on 2000 Census household data.¹⁸ Although the City acknowledges that the Commission has accepted 2000 Census data, it argues that such data should not be used in this instance because it does not provide an accurate basis for calculating the presence of effective competition.¹⁹ For example, Deland states that the 2000 Census household figure for the City is 20,904 whereas the University of Florida population figure is 23,829 (as of April 1, 2004).²⁰ Finally, Deland claims that the petition contains errors such as including zip codes that are not in the franchise area, although it doesn't specify which ones, and questions whether the MBC data includes post office boxes, commercial subscribers, and recreational and seasonal households.²¹

6. In reply, Bright House alleges that DBS service is available to more than 50 percent of the City because even if 29 percent aren't able to receive DBS service, 71 percent would still be able to receive service and therefore the 50 percent prong of the effective competition test would still be satisfied.²² In addition, Bright House argues that the Commission's OTARD rules prohibit landlords from preventing MDU residents from taking DBS service, and in any event, the Commission has rejected such arguments and found that cities with large numbers of MDU contracts were sufficient to establish effective competition under the competing provider test.²³ Bright House also rejects the City's argument that subscribers are not aware of the availability of DBS service. According to Bright House, the awareness of residents is demonstrated by the fact that 1,394 households or 16.65 percent of Deland residents currently subscribe to DBS.²⁴ Bright House also claims that due to the ubiquitous availability of DBS, residents are reasonably aware that DBS service is available. Nonetheless, Bright House provided examples of advertisements with its Reply.²⁵

7. Bright House argues that the Commission has held in numerous proceedings that MBC data is a valid and acceptable means for demonstrating DBS penetration for effective competition.²⁶ According to Bright House, the Commission has held that under Section 76.907(c) of its rules, cable

¹⁵*Id.* at 2-3.

¹⁶*Id.*

¹⁷*Id.* at 3-4.

¹⁸*Id.* at 4.

¹⁹*Id.*

²⁰*Id.* at 4-5.

²¹*Id.* at 5-6.

²²*Id.* at 2.

²³*Id.* at 2-3.

²⁴*Id.* at 4.

²⁵*Id.* at 4-5.

²⁶*Id.* at 5-6.

operators may request subscriber information from competitors for the purposes of effective competition, however, that information may be limited to numerical totals because DBS providers will not provide the data directly to cable operators.²⁷ Furthermore, the City should not be concerned about post office boxes and commercial accounts since the DBS providers have filtered the data before providing it to MBC to reflect service locations and remove any commercial accounts.²⁸ With regard to the City's concern that there may be 184 seasonal recreational or occasional homes in the City, Bright House argues that even if they are removed, the number of households subscribing to DBS still exceeds 15 percent.²⁹

8. Finally, Bright House rejects the City's alternative household numbers. Bright House argues that the household numbers suggested by the City reflect building permits rather than occupied housing, which are not always the same.³⁰ Therefore, if those numbers were to be used, they would have to be discounted by 9.7 percent which would add only an additional 1,595 households, and even with the inclusion of these additional households, the DBS penetration rate would still exceed 15 percent.³¹ Thus, the competing provider test is still met.

9. We find that the City's arguments lack merit. As Bright House notes, we have repeatedly accepted MBC/SkyTrends' subscriber reports on behalf of the DBS providers in satisfaction of Section 76.907(c) of the Commission's rules.³² Bright House provided Deland with the relevant portion of the SkyTrends report identifying the total number of DBS subscribers allocated to the franchise areas.³³ Accordingly, we will accept the number of Deland DBS subscribers indicated in Bright House's petition. We also reject the City's argument that the 2000 Census data is outdated since we have consistently held that 2000 Census data is sufficiently reliable for effective competition determinations.³⁴ Nevertheless, the Commission has indicated that it "will accept more recent household data that is demonstrated to be reliable."³⁵ The City has not offered more-recent, equally-reliable data regarding the number of households in the franchise area. We will therefore use the Census 2000 data submitted by Bright House.

10. Bright House asserts that it is the largest MVPD in the communities because Bright House's subscribership exceeds the aggregate DBS subscribership for those franchise areas.³⁶ Based upon the aggregate DBS subscriber penetration levels, as reflected in Attachment A, calculated using Census 2000 household data,³⁷ we find that Bright House has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the communities. Therefore, the second prong of the competing provider test is satisfied as to the communities. Based on the foregoing, we conclude that Bright House has submitted

²⁷*Id.* at 6.

²⁸*Id.* at 7.

²⁹*Id.*

³⁰*Id.* at 7-9.

³¹*Id.* Bright House argues that the City's proposed household numbers would have to be discounted by 9.7 percent to reflect the discrepancy between the number of households and the number of housing units in the City.

³²See 47 C.F.R. § 76.907(c); see, e.g., *Cablevision of Paterson*, 17 FCC Rcd 17239(2002); *Mountain Cable Company d/b/a Adelphia Cable Communications*, 14 FCC Rcd 13994, 13997 n.26 (1999).

³³Petition at 7 and Exhibit D.

³⁴See, e.g., *Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *MCC Iowa LLC*, 2005 WL 2513517 (2005).

³⁵*Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *MCC Iowa LLC*, 2005 WL 2513517 (2005).

³⁶Petition at 7-9 and Exhibit E.

³⁷*Id.* at 7-10 and Exhibit G.

sufficient evidence demonstrating that its cable systems serving the communities are subject to effective competition.

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petition filed by Bright House Networks, LLC for a determination of effective competition filed in the Communities listed on Attachment A **IS GRANTED**.

12. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Bright House **ARE REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

³⁸47 C.F.R. § 0.283.

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COMMUNITIES SERVED BY BRIGHT HOUSE NETWORKS, LLC

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS Subscribers⁺	Bright House Subscribers⁺
Deland	FL0116	16.64%	8375	1394	7574
Palm Coast	FL0374	43.63%	13628	5946	11921
Ormond Beach	FL0016 FL0417	16.4%	15629	2564	15743
Orange City	FL0136	17.21%	3062	527	3338

*CPR = Percent of competitive DBS penetration rate.

⁺See Bright House Petition at 7-8 and Exhibits C, D, and E.